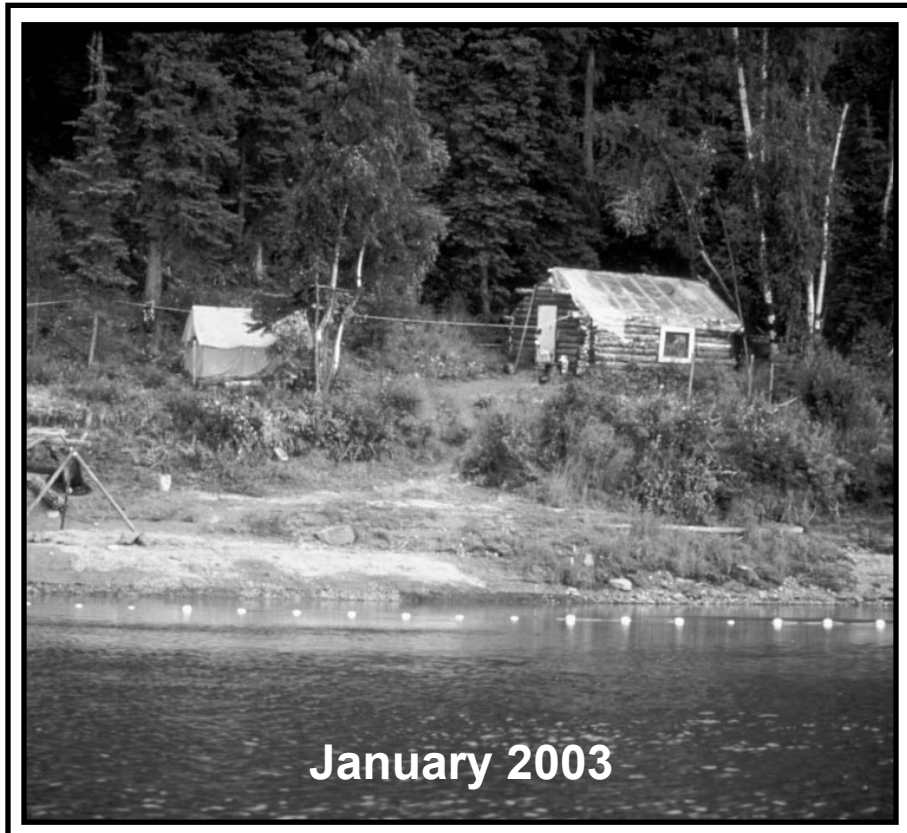


CUSTOMARY TRADE

Federal Subsistence Board



Meeting Materials

January 7, 2003 Interagency Staff Committee

January 14, 2003 Federal Subsistence Board

**Board Room, Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, Alaska**

Contents

| | |
|---|-----------|
| <i>Background Information</i> | 1 |
| <i>Proposed Rule for Customary Trade.....</i> | 2 |
| <i>Alternatives for Consideration.....</i> | 3 |
| <i>Discussion</i> | 8 |
| <i>Staff Recommendation.....</i> | 10 |
| <i>Justification</i> | 12 |
| <i>Appendix.....</i> | 13 |
| Comment Summaries Prior to May 2002 Federal Subsistence Board Meeting..... | 13 |
| Comments From Extended Comment Period August-November 2002..... | 25 |

Contact Information

*Pete Probasco
Office of Subsistence Management
3601 C Street, #1030
Anchorage, AK 99503
(800) 478-1456 or (907) 786-3888
pete_probasco@fws.gov
<http://alaska.fws.gov/asm/home.html>*

Background

Title VIII of ANILCA specifically identifies customary trade as a subsistence use. During the development of the Federal fishery regulations in 1999, an attempt was made to accommodate ongoing customary trade practices. Presently, the Federal regulations provide for a limited sale of subsistence-taken fish, their parts or their eggs as customary trade, as long as the sale does not constitute a significant commercial enterprise. In addition, no one may purchase or barter for these items for use in, or resale, to a significant commercial enterprise. However, neither legislative history nor the regulations define significant commercial enterprise or specify an allowable level of customary trade. While these regulations recognize the importance of customary trade to rural Alaskan subsistence economies, they are not specific enough to regulate allowable levels, enforce limitations, or prevent abuses.

The rule proposed by the Federal Subsistence Board in December 2001, recommends that no dollar limit be set on exchanges for cash of subsistence-caught fish, parts, or eggs between rural residents. The proposed rule would prohibit such exchanges to fisheries businesses, whether rural or non-rural. However, the exchange for cash between rural residents and others (non-rural) would be allowed as long as the exchange does not make up a significant commercial enterprise. In taking this action, the Board addressed the area of major concern, i.e. “fisheries businesses” and felt the best way to proceed in working towards the development of a final regulation was to maintain status quo for transactions between rural residents and others.

In response to public comments during their May 2002 meeting, the Board deferred action on the proposed rule for customary trade until January 2003. This decision provided for an extended review opportunity for the Regional Subsistence Advisory Councils, public, Tribal organizations, and Federal and State agencies.

Proposed Rule

For Regional Councils, Tribal Governments and Public Review

Title 50B Wildlife and Fisheries. 50CFR100.26 (11) (12) (13).

Title 36B Parks, Forest and Public Property. 36CFR242.26(11)(12)(13).

Subpart D – Subsistence Taking of Fish and Wildlife

In Subpart D of 36 CFR part 242 and 50 CFR part 100, § ___.27 (c) is revised to read as follows:

§ ___.27 Subsistence taking of fish.

(c) * * *

(11) Transactions Between Rural Residents – The exchange between rural residents in customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, unprocessed or processed using customary and traditional methods, is permitted.

(12) Transactions Between a Rural Resident and Others – Customary trade for fish, their parts, or their eggs, legally taken under the regulations in this part from a rural resident to commercial entities other than fisheries businesses or from a rural resident to individuals other than rural residents is permitted, as long as the customary trade does not constitute a significant commercial enterprise.

(13) No Purchase By Fisheries Businesses – If you are required to be licensed as a fisheries business under Alaska Statute, AS 43.75.011, you may not purchase or receive for commercial purposes or barter or solicit to barter for, subsistence-taken fish, their parts, or their eggs.

Alternatives

ALTERNATIVES DERIVED FROM PUBLIC COMMENTS -- August 2002

The proposed rulemaking was the result of a task force commissioned by the Federal Subsistence Board to address perceived deficiencies in the existing Federal subsistence management program regulations on customary trade. The task force included representatives from the ten Regional Advisory Councils as well as Federal and State agency representatives. This proposed rulemaking was presented to the Board in December 2001 and subsequently published for public comment purposes.

Public comments received as a result of the publication of the proposed rulemaking, generally fell in three categories or alternatives. The bulk of these comments supported either alternative 1 or 2. Alternative 3 is the result of recommendations developed during public meetings held by the ten Regional Councils this past winter.

ALTERNATIVE 1 – Take No Action

This option would maintain the status quo, which permits customary trade unless it results in a “significant commercial enterprise.” In the future, any perceived abuses would be addressed on a case-by-case basis with appropriate regulatory changes. This would be responsive to comments questioning the need for any new regulation or change to present regulations regarding customary trade.

The current regulations are:

§ _____.26(11) The limited exchange for cash of subsistence-harvested fish, their parts, or their eggs, legally taken under Federal subsistence management regulations to support personal and family needs is permitted as customary trade, so long as it does not constitute a significant commercial enterprise. The Board may recognize regional differences and define customary trade differently for separate regions of the State.

(12) Individuals, businesses, or organizations may not purchase subsistence-taken fish, their parts, or their eggs for use in, or resale to, a significant commercial enterprise.

(13) Individuals, businesses, or organizations may not receive through barter subsistence-taken fish, their parts or their eggs for use in, or resale to, a significant commercial enterprise.

ALTERNATIVE 2 – Limit Implementation

This option would prohibit subsistence caught fish from entering into the commercial market, while permitting current customary trade practices between individuals to continue. This option would be responsive to comments that the primary concern is to prevent subsistence caught fish from entering commercial markets.

~~§ _____.26 (13) Individuals, businesses, or organizations may not receive through barter subsistence-taken fish, their parts or their eggs for use in, or resale to, a significant commercial enterprise~~

§ _____.26 (13) No Commercial Transactions - (a) You may not sell subsistence taken fish, their parts, or their eggs to any individual, business, or organization required to be licensed as a fisheries business under Alaska Statute 43.75.011.

(b) If you are required to be licensed as a fisheries business under Alaska Statute 43.75.011, you may not purchase or receive with the intent to sell subsistence taken fish, their parts, or their eggs.

(c) Sale of subsistence taken fish, their parts, or their eggs purchased or otherwise acquired by an individual or businesses other than fisheries businesses is prohibited.

ALTERNATIVE 3 – Implement Changes to Paragraphs (11), (12), and (13)

This option would implement paragraphs (11) and (12) on a regional basis following the guidelines recommended by the Regional Councils. Where there is no Regional Council recommendation paragraphs (11) and (12) would be as presented in the proposed rule. Paragraph (13) would be implemented as presented in Alternative 2 on a statewide basis.

This option would respond to comments that differing regional practices and needs must be provided for and would prohibit subsistence caught fish from entering into the commercial market. To be effective, a system of record keeping would need to be instituted if regional regulations limit the amount of fish exchanged for cash or the amount of cash exchanged.

The regulations would read as follows:

“(11) Transactions Between Rural Residents – the exchange for cash between rural residents in customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, is permitted, subject to the following conditions.”

(A) In the Yukon-Northern Fishery Management Area, in the Yukon River drainage upstream from Piamute, eggs may not be exchanged in customary trade except when included with the whole fish.

(B) In the Bristol Bay Fishery Management Area, the total cash value per household of salmon taken in the Bristol Bay Area and exchanged in customary trade or barter to rural residents may not exceed \$500.00 annually.

(C) In the Aleutian Islands and Kodiak Fishery Management Areas, the total cash value per household member of salmon taken in the Kodiak or Aleutians Area and exchanged in customary trade or barter between rural residents may not exceed \$500.00 annually.

“(12) Transactions Between Rural Residents and Others – The exchange for cash

between rural residents and individuals other than rural residents in customary trade of subsistence harvested fish, their parts, or their eggs, legally taken under the regulations in this part is permitted, subject to the following conditions:

(A) Subsistence harvested fish, their parts, or their eggs, purchased or otherwise acquired by individuals other than rural residents may not enter commerce at any point.

(B) In the Yukon-Northern Fishery Management Area,

(1) in the Yukon River drainage between Piamute and Tanana, customary trade for fish or their parts, except their eggs, legally taken under the regulations in this part, from rural residents to individuals other than rural residents is permitted.

(2) No more than 50% of all fish taken by the seller under Federal subsistence regulations may be sold to individuals other than rural residents.

(3) If in-season subsistence restrictions are imposed for a salmon species or if escapement goal thresholds are not met on the majority of the Yukon River drainage, sale of that species to individuals other than rural residents is prohibited.

(4) If you engage in customary trade of subsistence-harvested fish or their parts with individuals other than rural residents, you must keep a subsistence harvest record and a record of sales and have those records in your possession.

(C) In the Yukon-Northern Fishery Management Area, in the Yukon River drainage upstream from Tanana, customary trade for fish or their parts, except their eggs, from rural residents to individuals other than rural residents is permitted.

(D) In the Kuskokwim Fishery Management Area,

(1) in the Kuskokwim River drainage upstream from Kalskag, customary trade for fish or their parts, except their eggs, legally taken under the regulations in this part from rural residents to individuals other than rural residents is permitted.

(2) No more than 50% of all fish taken by the seller under Federal subsistence regulations may be sold to individuals other than rural residents.

(3) If in-season subsistence restrictions are imposed for a salmon species or if escapement goal thresholds are not met on the majority of the Yukon River drainage, sale of that species to individuals other than rural residents is prohibited.

(4) If you engage in customary trade of subsistence-harvested fish or their parts with individuals other than rural residents, you must keep a subsistence harvest record and a record of sales and have those records in your possession.

(E) In the Bristol Bay Fishery Management Area, the total cash value per household of salmon taken in the Bristol Bay Area and exchanged in customary trade or barter between rural residents and individuals other than rural residents may not exceed \$400.00 annually. A subsistence fisheries harvest permit is required; all customary trade sales must be recorded on the customary trade record keeping form included on the back of the permit.

(F) In the Aleutian Islands and Kodiak Fishery Management Areas, the total cash value per household member of salmon taken in the Kodiak or Aleutian Islands Area and exchanged in customary trade or barter between rural residents and individuals other than rural residents may not exceed \$500.00 annually. At least 50% of all fish taken under federal subsistence regulations must be kept for the harvester's personal use.

(G) In the Cook Inlet Fishery Management Area, customary trade between rural residents and individuals other than rural residents is permitted. At least 50% of all fish taken under federal subsistence regulations must be kept for the harvester's personal use. The total cash value per household member of salmon taken in the Cook Inlet Area and exchanged in customary trade or barter to individuals other than rural residents may not exceed \$1,000 annually. A subsistence fisheries harvest permit is required; all customary trade sales must be recorded on the customary trade record keeping form included on the back of the permit.

(H) In the Prince William Sound Fishery Management Area, customary trade between rural residents and individuals other than rural residents is permitted. At least 50% of all fish taken under subsistence regulations must be kept for the harvester's personal use. The total cash value per household member of salmon taken in the Prince William Sound Area and exchanged in customary trade or barter to individuals other than rural residents may not exceed \$1,000 annually. A subsistence fisheries harvest permit is required; all customary trade sales must be recorded on the customary trade record keeping form included on the back of the permit.

~~*“(13) Individuals, businesses, or organizations may not receive through barter subsistence-taken fish, their parts or their eggs for use in, or resale to, a significant commercial enterprise.”*~~

§____.26 (13) No Commercial Transactions - (a) You may not sell subsistence taken fish, their parts, or their eggs to any individual, business, or organization required to be licensed as a fisheries business under Alaska Statute 43.75.011.

(b) If you are required to be licensed as a fisheries business under Alaska Statute 43.75.011, you may not purchase or receive with the intent to sell subsistence taken fish,

their parts, or their eggs.

(c) Sale of subsistence taken fish, their parts, or their eggs purchased or otherwise acquired by an individual or businesses other than fisheries businesses is prohibited.

Discussion

One of the subsistence uses protected under ANILCA is “customary trade.” In addition, one of the fourteen issues addressed in the *Federal Subsistence Fisheries Implementation Plan* is the need to characterize customary trade practices and to determine the need for regulation of allowable levels. Federal regulations that became effective October 1, 1999 recognize the importance of “customary trade” to rural Alaskan subsistence communities. While Federal regulations permit the exchange of subsistence harvested fish for cash on a limited basis; they also prohibit individuals, businesses, or organizations from purchasing or receiving through barter subsistence-taken fish for use in or resale to “a significant commercial enterprise.”

Unfortunately, the regulations fail to define significant commercial enterprise or an allowable level of customary trade. However, in reviewing legislative history from the 96th Congress 1st session (Senate) – Report No. 96-413, the intent of Congress to prohibit the unlimited exchange for cash is clear. The report states that the committee did not intend for “customary trade”, to be construed to permit the establishment of significant commercial enterprises under the guise of “subsistence uses.”

The Federal Subsistence Board has committed to preserve the traditional customary trade practices and recognize regional differences while preventing abuses. In reviewing the regulations that allow “customary trade,” however the Board expressed concerns that these regulations are ambiguous, allow for more than one interpretation, and hamper effective law enforcement to prevent abuses. The Board realized that the process of research and development of clear regulatory language to clarify the definition of “customary trade,” and the parameters which would define the limitations of what constitutes a “significant commercial enterprise,” could be highly controversial, arduous, and divisive.

To meet its objectives, the Board established a Customary Trade Task Force to develop draft regulatory language to clearly define the intent of “customary trade” as specifically identified in Title VIII of ANILCA. The Task Force membership consisted of one representative from each of the 10 Regional Advisory Councils, federal agency staff consisting of fisheries biologists, cultural anthropologists, a council coordinator, enforcement personnel, and a State of Alaska, Department of Fish and Game representative.

This process was initiated in the fall of 2000 and after numerous Task Force, Staff Committee and Board meetings; the proposed rule defining “customary trade” is now before the Board for deliberation. The Board’s intent on developing this proposed rule was to allow for each of the 10 Federal Regional Advisory Councils, tribal governments, public and other State and Federal agencies to discuss this issue further and provide the necessary feedback to further enhance the proposed rule and to assist in defining the limits of a significant commercial enterprise. From this feedback the Board will consider: What limitations should be placed on the exchange for cash between rural and nonrural residents? Should there be a cash limit between rural residents? How will cash sales affect subsistence needs, traditions, and the values of the subsistence lifestyle?

The Board has received meaningful testimony, both written and oral, from each of the 10 Councils, public, tribal governments, and State and Federal agencies. These comments are summarized and provided in the appendix section of this document. Regional Council recommendations are also summarized in this section.

These comments and recommendations reflect a wide array of input, ranging from recommendations to take no action, to dollar specific limitations or caps regarding cash exchanges between rural and non-rural users. However, an overlying theme can be surmised and simply stated; the rural subsistence users concern focuses on the unknown of the potential impact of regulating this complex issue may have on the rural communities of Alaska and their subsistence way of life. In the views of others, the potential negative impacts of hastily crafted regulations that are too broad and far reaching cannot be overstated and taken lightly. The need to move slowly and cautiously has been echoed throughout this process. The Board must be cognizant of traditional and cultural values when developing regulations defining “customary trade” as it pertains to the subsistence lifestyle. But at the same time, the regulations developed must safeguard these long traditional practices and still prevent abuses. Regional Councils and rural residents emphasized that in most cases the traditional practices involving “customary trade” are self-limiting and this concept should be utilized as a corner stone in developing regulations.

Staff Recommendation

Modify the proposed rule. The modified regulation would read as follows:

Title 50B Wildlife and Fisheries. 50CFR100.26 (11) (12) (13).

Title 36B Parks, Forest and Public Property. 36CFR242.26(11)(12)(13).

Subpart D – Subsistence Taking of Fish and Wildlife

In Subpart D of 36 CFR part 242 and 50 CFR part 100, § ___.27 (c) is revised to read as follows:

§ ___.27 Subsistence taking of fish.

(c) * * *

(11) Transactions Between Rural Residents – The exchange between rural residents in customary trade of subsistence-harvested fish, their parts, or their eggs, legally taken under the regulations in this part, unprocessed or processed using customary and traditional methods, is permitted.

(12) Transactions Between a Rural Resident and Others – Customary trade for fish, their parts, or their eggs, legally taken under the regulations in this part from a rural resident to commercial entities other than fisheries businesses or from a rural resident to individuals other than rural residents is permitted, ***subject to the following conditions:*** as long as the customary trade does not constitute a significant commercial enterprise.

(a) Subsistence harvested fish, their parts, or their eggs, purchased or otherwise acquired by individuals other than rural residents or commercial entities other than fisheries businesses must be used for personal or family consumption of the individual who purchases the fish and cannot be resold.

**Note:*

- *Family is currently defined in regulation: Family means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis.*
- *Household is currently defined in regulation: Household means that group of people residing in the same residence.*
- *Person is currently defined in regulation: Person means an individual and does not include a corporation, company, partnership, firm, association, organization, business, trust or society.*

(13) ~~No Purchase By Fisheries Businesses – If you are required to be licensed as a fisheries business under Alaska Statute, AS 43.75.011, you may not purchase or receive for commercial purposes or barter or solicit to barter for, subsistence-taken fish, their parts, or their eggs.~~ ***No Commercial Transactions - (a) You may not sell subsistence harvested fish, their parts, or their eggs to any individual, business, or***

organization required to be licensed as a fisheries business under Alaska Statute 43.75.011.

(b) If you are required to be licensed as a fisheries business under Alaska Statute 43.75.011, you may not purchase or receive with the intent to sell subsistence harvested fish, their parts, or their eggs.

Justification

As stated earlier the comments and recommendations received by the Board reflected a wide array of input. With the exception of one of the Regional Advisory Councils, which requested an extension of the comment period, comments and recommendations from the other Regional Councils, in part, reflect portions of the modified proposed regulatory language. These Regional Councils support sections (11) and (13) as proposed with some recommending additional modified language; prohibiting sales to any Alaskan State Business license holder, prohibiting sales to commercial dog teams and/or preventing the sale of eggs.

The greatest divergence of opinion in reviewing Regional Council recommendations is observed in section (12). However, similar to the proposed modified regulatory language, the majority of these Regional Councils did recommend some form of limitation in the cash exchange between rural residents and others. These recommendations proposed various options including a dollar limit, defining the limits (percentage) of the harvest that could be sold, disallowing the product to enter commerce at any point, requiring the purchaser to use the subsistence harvested fish, their parts, or their eggs for personal or family consumption or allowing the sale to occur as long as it does not constitute a significant commercial enterprise.

History has shown us that when a regulatory body elects to tackle a complex issue such as “customary trade” the final results are rarely achieved at the first attempt. In fact, the refinement of the regulation or regulations is not fully realized until numerous re-visitations of issue. It is recommended that an approach be used to define customary trade where the first attempt is to develop a regulation that addresses the area of greatest potential for abuse and defers any further action for future consideration by the Board if deemed necessary.

The proposed regulation as modified, would establish a regulation preventing the cash exchange of subsistence-harvested fish where the greatest potential for abuse could occur, i.e. commercial transactions. Other transactions would be permitted to occur, safeguarding traditional and customary practices.